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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

G. HAROLD EARLE and STEWART E. EARLE, Former Executors of the Estate of Emma Earle, Deceased, and Residuary Beneficiaries of Said Estate, *Petitioners*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

The petitioners, G. Harold Earle and Stewart E. Earle, former executors of the estate of Emma Earle, deceased, and residuary beneficiaries of said estate, pray that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above entitled cause on October 23, 1946.

OPINIONS BELOW.

The opinion of The Tax Court of the United States (R. 17-34) is reported at 5 T. C. 991. The opinion of the Circuit Court of Appeals (R. 88-90) is reported at 157 F. 2d 501.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on October 23, 1946 (R. 87). The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Where a trust estate is terminated and distribution made by a state court in accordance with the terms of the trust instrument, and such action is uncontested and becomes final, may the federal government set aside the state court decree, reassign the distributions of income made by the state court, treat the corpus of the trust party as income, and assert a tax against an estate on such reassigned property (or income) which never became an asset of the estate in question under the decree of the state court terminating the trust estate and assigning the residue?

STATUTE INVOLVED.

The statute involved is § 811(a) of the Internal Revenue Code which defines a decedent's gross estate as follows:

SEC. 811. GROSS ESTATE.

> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> (a) DECEDENT'S INTEREST.—To the extent of the interest therein of the decedent at the time of his death;
> * * *

STATEMENT OF THE CASE.

George W. Earle died on October 10, 1923, and his will was admitted to probate on November 27, 1923, by the Probate Court of Menominee County, Michigan (R. 19-20, 57). The will provided in part as follows (R. 20-21, 57-60):

After the payment of my just debts, liabilities and funeral expenses, I give, devise and bequeath *all* of my estate, both real and personal and wherever situate, unto G. Harold Earle, Stewart Earle and Charles M. Case, as trustees, and the survivor of them and his successor thereto, and his heirs, executors and administrators, respectively, according to the nature thereof, upon trust, to sell, convey or mortgage such parts of the trust property upon such terms as they may deem advisable, *and to invest the proceeds thereof, or any moneys belonging to said trust estate, in such securities or in the carrying on of any business* in which I may be interested at the time of my death, or to engage in any other business or enterprise of any nature whatsoever, as they may from time to time deem advantageous, with power to employ at such salaries as they shall think fit, such persons as may be necessary to carry on such business or enterprises, *and generally to act in all matters relating thereto as if they were beneficially entitled to the same.*

* * * * * *

I further direct that *the income accruing to said trust estate shall be distributed at such times and in such amounts as said trustees shall deem best; said income to be paid to my wife, Emma Earle, one-third, to G. Harold Earle, his heirs, executors or administrators, one-third, and to Stewart Earle, his heirs, executors or administrators, one-third.*

Said trust to continue until the death of my said wife, Emma Earle, at which time said trust estate shall be closed and divided equally between my sons, G. Harold Earle and Stewart Earle. (Italics supplied.)

* * * * * *

The will also nominated Harold and Stewart Earle as executors, and they were appointed, qualified, and served as such until the administration of the estate was concluded on August 16, 1926 (R. 21). At that time, after due notice, they were discharged as executors, and the residue of the estate, consisting of both real and personal property, was transferred as corpus to them and to Charles M. Case as trustees of the testamentary trust provided for in the will

(R. 21-22, 47, 68-75). The attorney who drew the will (R. 43) represented the executors when the estate was transferred as corpus to the trustees (R. 69).

The order of the Probate Court read in part as follows:

> This day having been appointed for hearing the petition of G. Harold Earle and Stewart Earle, executors of said estate, praying that the residue of said estate be assigned to G. Harold Earle, Stewart Earle and Charles M. Case, as trustees under the Will and as sole devisees and legatees of said deceased, *and due notice of the hearing on said petition having been given as directed by said court,* the said petitioners appeared by G. R. Empson, their attorney.
>
> It appearing to the court that all debts, funeral charges, expenses of administration, and *all allowances for the maintenance of the family of said deceased,* and for the support of the children under seven years, have been fully paid; that the widow's *preferred claims to the personal estate have been fully satisfied;* that all proceedings required by law for the proper administration and settlement of said estate have been taken, and that there remains to be assigned to the said G. Harold Earle, Stewart Earle, and Charles M. Case, as trustees, *sole devisees and legatees of said estate,* a residue of the real estate of the value * * * ($26,255.81) and personal estate of the value of * * * ($2,082,793.20) which said real estate and personal property is described as follows, to wit:
>
> * * * * * *
>
> It further appearing that G. Harold Earle, Stewart Earle and Charles M. Case, as trustees, *are the sole devisees and legatees of said estate,*
>
> It is ordered that such residue, all of the personal property of every kind and nature and all of the real estate in fee simple, of which deceased died seized, be and the same is hereby assigned to the said G. Harold Earle, Stewart Earle and Charles M. Case, as trustees, and their successors, according to the last Will and Testament of the said deceased. (R. 69, 75; italics supplied.)

During the administration of this testamentary trust the trustees accumulated part of the income of the trust, believing that the will granted them discretion to do so and that they were carrying out the testator's intent. They reinvested a large part of the accumulated income. They were never criticized for their acts in administering the trust. Whenever cash distributions were made to Emma Earle, like amounts were distributed to Harold and Stewart. (R. 22-23, 46, 53-54, 57.) These distributions were discontinued when Emma Earle notified the trustees that she did not want any further amounts distributed to her (R. 24, 53, 56-57).

After her husband's death Emma Earle continued to live in the large home which she owned in Hermansville. She traveled extensively and had her own car, chauffeur, and household servants (R. 23, 44). She owned stock in the Wisconsin Land and Lumber Company on which she received substantial dividends and she received interest on her savings (R. 24, 46-47, 61-68). During the period from her husband's death in 1923 until her death in 1940 she accumulated over $92,000 in savings (R. 24, 55, 61-68). Her only heirs at law were her two sons, G. Harold Earle and Stewart E. Earle, who were also two of the trustees of the said trust (R. 19-20).

Emma Earle died November 1, 1940, a resident of Hermansville, Michigan. She left a will under which her two sons, the petitioners, were appointed executors of her estate. They filed an estate tax return with the collector for the district of Michigan and paid the tax shown therein to be due. Thereafter they distributed to themselves as residuary beneficiaries the corpus of her estate remaining after the payment of debts, expenses, etc. (R. 19.)

Following the death of Emma Earle the testamentary trust of George W. Earle was also closed and the assets then on hand were distributed to petitioners as the residuary beneficiaries of the trust. This distribution was ordered by the probate court in a final decree which recited that

G. Harold Earle and Stewart E. Earle were "* * * the only persons interested in said estate * * *" (R. 76-83).

The respondent subsequently determined a deficiency in estate tax against the estate of Emma Earle by including as corpus of her estate one-third of the undistributed income of the estate of George W. Earle and of the trust created by George W. Earle (R. 11-13). On an appeal from this determination the Tax Court affirmed in principle the action of respondent (R. 17-34) as did the Circuit Court of Appeals (R. 87-90).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court erred:

1. In holding that the income of the estate of George W. Earle, deceased, was distributable and that the undistributed portion thereof did not become part of the testamentary trust corpus, as decreed by the state court.

2. In holding that all of the undistributed income of the trust should have been distributed (one-third to Emma Earle), contrary to the state court decree.

3. In failing to find and hold that the trustees under the will of George W. Earle were granted discretion with regard to the distribution of the income accruing to the testamentary trust.

4. In failing to follow the state court decrees terminating the said estate of George W. Earle and the said residuary trust estate.

REASONS FOR GRANTING THE WRIT.

1. The opinion below followed *Commissioner* v. *Child's Estate*, 3 Cir., 147 F. 2d 368, in holding that an otherwise controlling state court decree would not be followed when it was entered in an uncontested proceeding. Both the cited case and the decision below are in direct conflict

with *Henricksen* v. *Baker-Boyer National Bank*, 9 Cir., 139 F. 2d 877, 881; *Frederich* v. *Commissioner*, 5 Cir., 145 F. 2d 796, 798; and *Eisenmenger* v. *Commissioner*, 8 Cir., 145 F. 2d 103, 107; where uncontested state court decrees were held to be controlling for federal tax purposes.

In *Blair* v. *Commissioner*, 300 U. S. 5, and *Sharp* v. *Commissioner*, 303 U. S. 624, cited below (R. 89), this Court held that the state court decrees in litigated cases were controlling as to the interests or rights actually owned by the subject sought to be taxed. The decision below grafts an exception on this ruling in all instances where the parties are in agreement as to the proper devolution of property under state law, and there is, therefore, no contest in the state courts. The efficacy of state court decrees in such cases is a matter of recurring importance in federal tax litigation, and the conflict between the Circuit Courts considering this question should be settled by this Court.

2. The Circuit Court in its opinion held that—

> * * * the interest of a decedent under a will may be liable for an estate tax even though the property has never been received (R. 89).

If this language implies (as it must here) that a decedent's estate can be taxed on property which the decedent never actually received and which under final state court decrees the decedent's estate *never will actually receive*, it is submitted that the scope of the ruling below is so broad as to warrant review by this Court.

In the lower court petitioners contended that the estate should not be taxed on property which neither the decedent nor the estate ever received. The argument was brushed aside as "academic" on the ground that the petitioners individually received the money here involved from their father's estate if not from their mother's (R. 89). But if they inherited the amount involved from their father, or through a trust created by him in his will, it certainly could not have been an asset of their mother's estate so as to be taxable to her estate.

3. The decision below in permitting estate income to retain its identity when transferred to a testamentary trust as corpus of the trust (R. 68-75) conflicts with *Weigel* v. *Commissioner*, 7 Cir. 96 F. 2d 387, 389, where in an income tax case the Circuit Court held:

> * * * in the case of the creation of a testamentary trust out of the residue of an estate, the residue consisting of estate corpus and estate income, the reality, both factually and legally, is that estate income has ceased to have any identity. And it would seem to follow that *fiduciaries who take the residue as the res of a testamentary trust receive it as trust corpus* and not as a payment, in whole or in part, of estate income. (Italics supplied.)

CONCLUSION.

It is respectfully submitted that the tax effect of state court decrees in uncontested proceedings presents an important question of federal law with respect to which the Circuit Courts of Appeal are not in accord and that this petition for a writ of certiorari should be granted to resolve the conflict.

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January, 1947.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 900.

G. HAROLD EARLE and STEWART E. EARLE, Former Executors of the Estate of Emma Earle, Deceased, and Residuary Beneficiaries of Said Estate, *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

REPLY OF PETITIONERS TO BRIEF FOR THE RESPONDENT IN OPPOSITION.

The brief for the respondent in opposition to the petition for a writ of certiorari was served on petitioners on February 8, 1947. This reply brief is filed pursuant to subdivision 4(a) of Rule 38 of the Revised Rules of the Supreme Court.

ARGUMENT.

1. Whether or not the Tax Court correctly interpreted the will here involved and the effect of its action in doing so are questions which are beside the point—if, as a matter of law, the respondent must tax property as it, in fact, passes under valid state court decrees. The court below recognized this principle where the state court decrees were contested (R. 89), but applied a different rule herein since the state court decree was not contested. The distinction is without substance. Where parties to a probate proceeding are agreed upon the proper distribution of the estate, they should not be forced to concoct a fictional state court fight in order to freeze the manner of distribution for federal tax purposes. It is submitted that the estate tax should be imposed on property in the manner in which it actually passes by valid final state court decrees and that respondent should not be permitted to ignore such decrees and to realign the parties in order to tax a legal entity on the receipt of property which it has never in fact received.

2. Coming to the heart of the reasons why the petition should be granted, respondent finds no conflict (Br. 10) in the cases cited by petitioners *for the reason that* the state courts had considered the issues in the cited cases. The alleged consideration of the issues in those cases appears generally to have been the signing of consent decrees. By that test the probate court decrees in the case at bar were also "considered" (R. 75, 83).

The final order in the *Henricksen* case was preceded by a stipulation of the parties and the government sought to avoid its effect on the ground that the proceeding was "nonadversary" (139 F. 2d 877, 878, 881). The alleged construction therein of the will by the probate court was affirmed almost two years later by the same court in a tax suit against the State of Washington. This so-called construction amounted merely to an affirmation of what had already been done.

In the *Frederich* case the dissenting opinion flatly says that the issue was not presented to the probate court which indicates (as does the majority opinion) that the extent of the "consideration" given the order was the same as in the instant proceeding.

The consideration given by the state court in the *Eisenmenger* case was based in part upon the entire record and briefs in a Tax Court case, but the Tax Court found the state court proceeding "was nonadversary" (145 F. 2d 103, 107).

That the present status of these consent decrees is giving trouble to the lower courts is well illustrated in two recent cases.

In *William C. Chick* v. *Commissioner*, 7 T.C. No. 163, decided December 31, 1946, the taxpayer contended that the state court decree was conclusive, and relied strongly on *Frederich* v. *Commissioner, supra.* The Tax Court did not agree with the *Frederich* case and entered its decision on the issue in favor of the Commissioner. Two judges dissented in a vigorous opinion.

In *Craig* v. *United States*, W. D. Pa., 1946 P-H Federal Tax Service, ¶ 72,612, the District Court concluded that the uncontested state court decree there involved would have been conclusive except for recent decisions of this Court and the Circuit Court of Appeals for the Third Circuit. The District Judge stated in his opinion that he believed these recent holdings had "modified" the law "as formerly enunciated" (*Ibid.* p. 72,989). Significantly, the Third Circuit has not been consistent on the matter. It held uncontested[1] state court decrees to be conclusive in *Commissioner* v. *Crawford's Estate*, 139 F. 2d 616, 618, and not in the *Child's Estate* case, cited below (R. 89).

It is submitted that the problem of these uncontested state court decrees is one of frequent recurrence and should be authoritatively settled by this Court.

---

[1] That the state court decree in the *Crawford's Estate* case was uncontested appears more clearly in the Tax Court decision. *George W. Crawford Estate*, 1942 P-H Memorandum Decisions Service, ¶ 42,314.

3. The only difference between the *Weigel* case and the present proceeding is that the first involved an income tax while this case arises under the estate tax laws. Certainly, if distributions to a testamentary trust are corpus and not income for income tax purposes, they should not be income for purposes of increasing the estate tax of an income beneficiary.

4. The *Sharpe* case is the only one that has been presented in support of the far reaching principle that a party can be taxed on the ownership of property which under final state court decrees he never has or never will receive. The sweeping scope of this pronouncement clearly calls for a review by this Court.

CONCLUSION.

Uncontested state court decrees should be honored for federal tax purposes just as are contested decrees and to this end the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February, 1947.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 900

ESTATE OF EMMA EARLE, G. HAROLD EARLE AND STEWART E. EARLE, FORMER EXECUTORS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 17–34) is reported at 5 T. C. 991. The *per curiam* opinion of the court below (R. 88–90) is reported at 157 F. 2d 501.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 23, 1946 (R. 87). The petition for a writ of certiorari was filed on January 17, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the decedent had a vested interest in one-third of the income of a trust created by the will of her husband, so as to make one-third of the undistributed income thereof includible in her gross estate under the provisions of Section 811 (a) of the Internal Revenue Code.

2. Whether the local Probate Court, in which the estate of the husband was administered, has passed upon the extent of the interest of the decedent under her husband's will, so as to make the orders of the Probate Court binding in this case for tax purposes.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> (a) *Decedent's Interest.*—To the extent of the interest therein of the decedent at the time of his death;
>
> * * * * *

(26 U S. C. 811.)

STATEMENT

This proceeding involves a deficiency in estate tax determined by the Commissioner in the

amount of $55,606.06 (R. 9–15) against the estate of Emma Earle, deceased.[1]

The facts found by the Tax Court (R. 19–25), from the testimony (R. 41–57) and certain exhibits (R. 57–83) adduced before it, may, insofar as material to the issues remaining in this case, be summarized as follows:

G. Harold Earle and Stewart E. Earle are the sons and only children of Emma Earle and George W. Earle, both deceased. Emma Earle died November 1, 1940, leaving a will under which her sons, as executors, after payment of debts, expenses, etc., distributed her estate to themselves as residuary beneficiaries. (R. 19.)

George W. Earle died on October 10, 1923. In his will (R. 57–60), which was subsequently probated in a probate court in Michigan, he provided that, after the payment of his debts and expenses, all of his estate should go to his two sons and one Charles M. Case, as trustees, in trust until the death of his wife, at which time

[1] Fiduciary and transferee liabilities therefor were determined against G. Harold Earle and Stewart E. Earle, former executors and residuary beneficiaries of her estate, which asserted liabilities were the subject of four other separate proceedings before the Tax Court and in the court below, in which G. Harold Earle and Stewart E. Earle admitted their liability either as fiduciaries or transferees, or both, for any taxes due from the estate of Emma Earle (R. 19, 36). Separate petitions for writs of certiorari have been filed in this Court in those cases, Nos. 901, 902, 903, and 904, this Term, and the parties have stipulated therein that no further action should be taken pending the outcome of this case.

the trust was to be closed and the trust property divided equally between his sons (R. 19–21). The will further provided as follows (R. 21):

> I further direct that the income accruing to said trust estate shall be distributed at such times and in such amounts as said trustees shall deem best; said income to be paid to my wife, Emma Earle, one-third, to G. Harold Earle, his heirs, executors or administrators, one-third, and to Stewart Earle, his heirs, executors or administrators, one-third.

The two sons were appointed executors and served as such until the administration of the estate of George W. Earle was concluded on August 16, 1926, at which time they were discharged as executors and the residue of the estate was transferred to them and to Case, as trustees of the testamentary trust (R. 21–22).[2]

The estate (during administration) had income totalling $278,207.28, and made distributions to Emma Earle aggregating $21,554.81, while the trust had income totalling $807,159.52, and made distributions to Emma Earle aggregating $87,089.78 (R. 22).

---

[2] The trust continued until after the death of Emma Earle, when the trust property was turned over to the sons, one-half each, and the trustees were discharged by order of the Probate Court in 1941 (R. 76–83). One Chris H. Gribble has been substituted as trustee for Case, who had died (R. 22).

The trustees accumulated a large part of the income of the trust, believing that the will granted them discretion not to distribute it all and that they were carrying out the testator's intent. They reinvested the accumulated income, and they were never criticized for their acts. Whenever cash distributions were made to Emma Earle, like amounts were distributed to G. Harold and Stewart E. Earle. (R. 22–23.)

Emma Earle owned a large home, in which she lived until her death, received interest on her savings bank account and dividends on certain stock she owned, and by the time of her death had accumulated over $92,000 in savings. After 1935, Stewart Earle asked his mother whether she wanted any more money distributed to her and she said on several occasions that she did not. The money she had already accumulated was a responsibility and a concern to her, and she did not want the burden to increase. She did not, however, file with the trustees any written waiver of her interest under the trust, and she made no oral statement that she waived any rights. (R. 23–24.)

The Commissioner determined that one-third of the undistributed income of the George W. Earle estate and trust, was includible in the gross estate of the decedent, Emma Earle (R. 9–15).[3]

[3] The Commissioner's determination also involved other items, not here material.

The Tax Court held, sustaining the Commissioner, that one-third of the undistributed income of the George W. Earle estate and trust was includible in the gross estate of decedent Emma Earle, and accordingly entered its decision that there is a deficiency in estate tax of $48,322.28.[4]

The court below affirmed, in a *per curiam* opinion (R. 88–90).

ARGUMENT

1. The court below correctly affirmed the decision of the Tax Court holding that the Commissioner had properly included in the gross estate of decedent Emma Earle one-third of the undistributed income of the George W. Earle estate and trust.

From the terms of the will of George W. Earle, the Tax Court had correctly concluded—for the reasons well stated in its opinion (R. 26–28)—that, while the testator intended to give the trustees discretion as to the time and amounts of the distributions of income they were to make, he intended that all of the income was to be distributed and that the trustees were not to have any discretionary power to accumulate. The Tax Court further concluded that, even if resort to extrinsic evidence as to the testator's intent was warranted because of some ambiguity in the

[4] The Tax Court reduced the deficiency from the amount of $55,606.06 determined by the Commissioner (9–15) as a result of adjustments made which are not here material.

language of the will, there was nothing in such extrinsic evidence indicating an intent that the trustees were to have discretion to distribute less than all of the income (R. 28). From all of the evidence before it, the Tax Court concluded that it was the testator's intent that his wife Emma Earle should have a vested right to one-third of the income of the trust (R. 29), and that conclusion, which is clearly one of fact,[5] was binding on review unless unsupported by any substantial evidence. *Colorado Bank* v. *Commissioner*, 305 U. S. 23; *Helvering* v. *Rankin*, 295 U. S. 123. The Tax Court's conclusion that the decedent was entitled to one-third of the income absolutely is sound and correct, we submit, and was properly affirmed by the court below. See *Filley* v. *Commissioner*, 45 B. T. A. 826; *Bedford* v. *Commissioner*, 2 T. C. 1189, affirmed, 150 F. 2d 341 (C. C. A. 2d). Cf. *Doty* v. *Commissioner*, 148 F. 2d 503 (C. C. A. 1st).

The court below also properly refrained from disturbing the Tax Court's holding against the

[5] Although not separately set out as findings of fact, conclusions of fact made by the Tax Court in the course of its opinion have the full force and effect of findings of fact. *Flynn* v. *Commissioner*, 77 F. 2d 180 (C. C. A. 5th); *Keok Inv. Co.* v. *Commissioner*, 77 F. 2d 244 (C. C. A. 9th), certiorari denied, 296 U. S. 633; *Insurance & Title Guarantee Co.* v. *Commissioner*, 36 F. 2d 842 (C. C. A. 2d), certiorari denied, 281 U. S. 748; *Olson* v. *Commissioner*, 67 F. 2d 726 (C. C. A. 7th), certiorari denied, 292 U. S. 637; *American Box Shook Exp. Ass'n* v. *Commissioner*, 156 F. 2d 629 (C. C. A. 9th).

contention that the income of the estate of George W. Earle during the period of administration should not be taken into account in arriving at the amount of undistributed income includible in the decedent's estate (R. 30–31). In this connection, the Tax Court properly recognized (R. 30) that, in keeping with the general rule in trust law, the law of Michigan (which is applicable here) is that, except as otherwise provided by the terms of the will, where the will creates a trust the income of which is payable to a beneficiary for life or for a designated period, that beneficiary is entitled to receive the income from the date of death of the testator, as squarely decided in *Detroit Trust Co.* v. *Detroit Trust Co.*, 258 Mich. 386. See also *Poole* v. *Union Trust Co.*, 191 Mich. 162, and Restatement, Trusts, Sec. 234, Michigan Annotations.

2. A review of the decision below is sought here apparently on the theory that the Probate Court in Michigan, where the estate of George W. Earle was administered, had decided that the decedent Emma Earle did not have any interest in the income of the estate during the period of administration or in the undistributed income of the trust, and that such decision should be binding for federal estate tax purposes. The court below conceded (R. 89) that if the question of the interest of Emma Earle in the income had been considered and adjudicated by the Probate Court,

the order of the Probate Court would be binding in this case under the decisions in *Blair* v. *Commissioner,* 300 U. S. 5; and *Sharp* v. *Commissioner,* 303 U. S. 624. See also *Uterhart* v. *United States,* 240 U. S. 598; *Freuler* v. *Helvering,* 291 U. S. 35; *Helvering* v. *Stuart,* 317 U. S. 154; and *Helvering* v. *Rhodes' Estate,* 117 F. 2d 509 (C. C. A. 8th). But the court below correctly pointed out (R. 89) that if the Probate Court did not pass upon that question, then its decision is not controlling in the instant case, citing *Commissioner* v. *Childs' Estate,* 147 F. 2d 368 (C. C. A. 3d). Concluding that the record in this case does not show that the issue of the extent of the interest of Emma Earle under her husband's will was considered by the Probate Court,* the court below therefore affirmed the decision of the Tax Court that one-third of the undistributed

* Amongst other things, the court below rested its conclusion upon the fact that the orders of the Probate Court relied upon by the petitioner (R. 68–75, 76–82) were "perfunctory administrative orders," in a form not in all respects applicable to the facts, and showing upon their face that Emma Earle's interest was not considered (R. 90). That view of the orders is clearly supported by the recitals contained in them, to the effect that allowances "for the support of the children under seven years" (R. 69) or "for the support of the children under ten years of age" (R. 77) have been paid, which recitals are clearly formalistic and not applicable to the estate in question, since the only two children of George W. Earle (R. 19) are Stewart Earle, who was 28 years old in 1923 (R. 48), and Harold Earle, who is older than Stewart (R. 51).

income of the George W. Earle estate and trust was includible in the decedent's gross estate (R. 89–90). The decision of the court below on this point is in keeping with *Commissioner* v. *Childs' Estate, supra,* where it had been held that the adjudication by a state court is binding for federal tax purposes "only where such court has heard and determined the matter in question upon the merits" (147 F. 2d 370). See also *First-Mechanics Nat. Bank* v. *Commissioner,* 117 F. 2d 127 (C. C. A. 3d).

The decision below on this point and the decision in *Commissioner* v. *Childs' Estate, supra,* are not in conflict, as alleged (Pet. 6–7), with *Henricksen* v. *Baker-Boyer Nat. Bank,* 139 F. 2d 877 (C. C. A. 9th); *Frederich* v. *Commissioner,* 145 F. 2d 796 (C. C. A. 5th); or *Eisenmenger* v. *Commissioner,* 145 F. 2d 103 (C. C. A. 8th). In the *Henricksen* case, the specific question there material as to the wife's right to invade the corpus of the estate had been considered and passed upon by the state court, and that decision was therefore held to be controlling for tax purposes. Similarly, in the *Frederich* case the question there material, as to whether the administration of an estate should be kept open, had been considered and passed on by the state court (cf. dissenting opinion, 145 F. 2d 800). Likewise, in the *Eisenmenger* case, the specific question as to the rights of the beneficiary under the par-

ticular trust had been considered and decided by the state court.

3. Neither is there any conflict, as alleged (Pet. 8), between the decision below, which sustained the Tax Court's conclusion that the income of the George W. Earle estate during the period of administration should be taken into account in arriving at the amount of undistributed income includible in the gross estate of the decedent, and *Weigel* v. *Commissioner,* 96 F. 2d 387 (C. C. A. 7th). That case involved an entirely different question, namely, whether an estate was subject to an income tax upon certain income it realized during the period of administration, or whether it was entitled to a deduction therefor on the ground that the amount of income in question was distributed during the taxable year to the residuary legatee within the terms of Section 162 (c) of the Revenue Act of 1928. The language quoted by the petitioner from the opinion in this case (Pet. 8) had reference to distributions to trustees of testamentary trusts and not to the rights of legatees such as Mrs. Earle, and the court recognized that a different rule was applicable to the latter. See also *supra,* pp. 7–8.

4. Finally, there is no merit to the contention (Pet. 7) that the holding of the court below (R. 89), to the effect that "the interest of a decedent under a will may be liable for an estate tax even though the property has never been received", is

so broad in scope as to warrant review by this Court. Under the facts of this case, that statement is sound and correct, insofar as applied to the case of a decedent who has a vested interest under another's will. See *Sharpe* v. *Commissioner,* 107 F. 2d 13 (C. C. A. 3d), certiorari denied, 309 U. S. 665. Clearly, no occasion for review by this Court is presented on this point.

CONCLUSION

The decision below is correct. It turns upon the particular facts of the case and presents no question calling for review by this Court. There is no conflict of decisions. The petition should therefore be denied.

Respectfully submitted.

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